Supreme Court, U.S.

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No. 05-

In The
Supreme Court of the United States

FEMI JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 10, 2006

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government may vouch for the veracity of a prosecution witness by telling the jury that the trial court's immunity order "forces" the witness to testify truthfully.

2. Whether the Government may vouch for the veracity of a prosecution witness by telling the jury that the trial court has found the witness to be "truthful as a matter of law" in proceedings held outside the presence of the jury.

3. Whether the Government may vouch for the veracity of a prosecution witness by stating the prosecutor's personal belief as to the witness's truthfulness, so long as the prosecutor further argues that the witness's testimony is consistent with "all of the evidence."

PARTIES TO THE PROCEEDING

The Petitioner is Femi Johnson. Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Femi Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a)[1] is reported at 437 F.3d 665. The judgment of the district court (Pet. App. 22a-27a) is unreported.

[1] This Petition employs the following citation conventions: "Pet. App." refers to the appendix attached pursuant to Supreme Court Rule 14.1(i). "R." refers to items in the record on appeal. "P. Tr." along with a date refers to the transcript of the pre-trial or post-trial proceeding on that date. "Tr." refers to the trial transcript.

JURISDICTION

The judgment of the court of appeals affirming Petitioner's conviction was entered on February 10, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Petitioner Femi Johnson is a forty-seven year old immigrant from Nigeria and permanent resident of the United States who, before his conviction below, had no prior drug-related offenses. When a warrant was issued for his arrest, Mr. Johnson was in Nigeria helping to care for his ailing father who was ill and thought to be near death. He nonetheless voluntarily returned to the United States to defend himself against drug possession charges. Mr. Johnson was convicted of possession and conspiracy to distribute a controlled substance based almost entirely upon the testimony of an alleged co-conspirator, Kenny Mohammed, whose testimony conflicted with his own prior statements, accounts given by government agents, and other evidence presented at trial. Mohammed was the *only* witness

who testified that Mr. Johnson possessed heroin in conjunction with any of the alleged transactions.

During the course of the trial, prosecutors repeatedly told the jury that Mohammed's testimony was truthful. The prosecutors' vouching for and bolstering of Mohammed's credibility was pronounced and persistent. It consisted of blunt assurances of Mohammed's truthfulness (*i.e.*, "He told you the truth ..."); statements that Mohammed had "something to fear" and could be prosecuted for perjury if he did not tell the truth; suggestions that the government possessed information not heard by the jury; a statement directly asserting that an immunity order "force[d]" Mohammed to tell the truth; and even the suggestion that the trial judge had already determined Mohammed's truthfulness "as a matter of law." These pervasive, repeated comments improperly placed the imprimatur of the government and the trial court behind Mohammed's testimony and thereby denied Mr. Johnson his right to a fair trial.

1. The two drug transactions in which Mr. Johnson allegedly participated were the result of a government operation using an informant and long-time heroin dealer, Henry Adebayo, to institute controlled buys of heroin. *See* Tr. at 53, 71, 381-82, 389-90, Pet. App. 1a-3a. On or about January 20, 2000, Adebayo had a telephone conversation with Kenny Mohammed in which he stated that he wanted to purchase 50 grams of heroin. Tr. at 26-27, 197-99, Pet. App. 2a. The transaction was completed on January 28, 2000. Law enforcement agents observed as Mohammed approached a red Toyota Corolla, leaned into the passenger-side window, and walked back to a car driven by Adebayo. Mohammed then handed Adebayo the drugs in exchange for a Fed-Ex parcel containing $5,000. Tr. at 38-39. None of the agents observing the transaction saw or heard what took place inside the Corolla. None of the agents could identify the driver or see an exchange of anything between Mohammed and the individual in the Corolla. Tr. at 62, 91-

92. Nor did they ever recover any funds used in that transaction.

The second controlled buy occurred on February 16, 2000. Adebayo had previously told Mohammed that he wanted to purchase an additional 70 grams of heroin; Mohammed sold Adebayo the drugs in exchange for $7,000 in a Fed-Ex parcel. Tr. at 44-45, 175, 179, 184. Law enforcement agents again observed a red Corolla at the scene, but again could not identify the driver of the car. 4/3/02 P. Tr. at 31, 37-38.

After the transaction, agents followed the Corolla to a residence in South Chicago. Tr. at 319-20. The driver left the car and entered a residence. The agents could not identify the driver or provide identifying physical traits. Tr. at 273-74, 319-20. The agents maintained surveillance, and an individual, whom they also could not identify, eventually left the residence and entered the car. Tr. at 249, 321. Because the agents could not identify either individual, the agents did not know whether this individual was the same person who had previously been driving the Corolla. Tr. at 330-31.

The Corolla was later stopped and the driver identified as the Petitioner, Femi Johnson. The car was not, however, registered in Mr. Johnson's name. Tr. at 300, 304; 4/3/02 P. Tr. at 10-11. The officer searched the vehicle and found approximately $5,950 (not $7,000) in currency wrapped in a newspaper (not a Fed-Ex package) in the glove compartment. Tr. at 303-04, 328, 464, 473. The officer seized the money, which law enforcement agents later claimed was the currency used in the controlled buy of heroin earlier that day. Mr. Johnson was not arrested or charged with any role in the alleged drug transactions; rather, he was issued two traffic citations. Tr. at 306.

On February 24, 2000, an individual named Angela Abandy claimed the $5,950 that had been seized from the Corolla in the February 16 traffic stop. Tr. at 106-07. Ms.

Abandy signed a notarized statement that she had given the money to Mr. Johnson so that he could purchase a car on her behalf. R. 138, at 1; R. 215. Agents returned the money to Ms. Abandy (Pet. App. 18a) and, to the best of Petitioner's knowledge, the government has never sought to reclaim or otherwise recover the money from her.

Approximately one year later, law enforcement agents arrested Kenny Mohammed and charged him with possession of heroin. Mohammed had entered into a third transaction with Adebayo in which he agreed to sell 150 grams of heroin. Tr. at 188. Agents arrested Mohammed and searched his apartment, finding 200 grams of heroin inside a plastic bag in his closet. Tr. at 213, 221-23. Mohammed admitted that he did not receive the heroin from Mr. Johnson (*see* Tr. at 188, 221), but the government issued a warrant for Mr. Johnson's arrest, alleging that he was involved in the January and February 2000 drug transactions. Mr. Johnson, who was in Nigeria at the time caring for his ailing father, voluntarily returned to the United States to defend himself against the charges. Tr. at 481.

2. The prosecution granted Mohammed immunity and he testified at trial. *See* R. 148. By telling the government that Mr. Johnson supplied the heroin for the January 28 and February 16 drug transactions, Mohammed became eligible for a safety valve reduction in his sentence pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. *See* Tr. at 161, 206.

At trial, the government sought to link Mr. Johnson to the drug transactions through Mohammed's testimony. Mohammed testified that Mr. Johnson supplied him with heroin during both of the transactions. The government had no other evidence directly linking Mr. Johnson to either transaction. Although the transactions were the subject of heavy surveillance, *none* of the government agents saw Mr. Johnson at either transaction. None saw Mr. Johnson give anything to, or receive anything from, Kenny Mohammed.